IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13/09/2002

CORAM

THE HON'BLE MR. JUSTICE K. SAMPATH

S.A.No.1940 of 1989

Lakshmi Ammal ... Appellant

-Vs-

Thillai Natarajamurthi,
Kadiyapattinam Village,
Kalkulam Taluk,
Kanyakumari District. ... Respondent

For Appellant: ... Mrs. Chitra Sampath

For Respondent: ... Mr.K. Sreekumaran Nair

This second appeal is filed against the judgment and decree dated 2 9-8-1989 made in A.S.No.5/87 on the file of the Subordinate Judge, Padmanabhapuram.

:JUDGMENT
The defendant in O.S.No.350/83 on the file of the Principal District Munsif, Padmanabhapuram, is the appellant in the second appeal. The respondent herein filed the suit for redemption, partition and future profits on the following averments:
The suit property belonged to him and his deceased brother Subbian Chettiar. Subbian Chettiar sold his rights to the appellant/ defendant. On 10-10-1122 M.E., corresponding to 24-5-1947, the plaintiff executed an othi in favour of one Bagavathi Amma. On 11-11-1124 M.E., corresponding to 25-6-1949, the defendant obtained an assignment from Bagavathi Amma. The plaintiff is an agriculturist. The first item is agricultural land. The second item is garden land. As per Act 4 of 1938, the othi debt got fully discharged on 10-11-1154 M.E., corresponding to 25-6-1979. The plaintiff has become entitled to recover possession of the property. As he had 30 years for filing the suit, the suit was in time. The plaintiff could get redemption of the othi as per Oodukur rights. The plaintiff through his Power of Attorney Holder, suggested to the defendant on 27-2-1983 to have a settlement. The defendant not having accepted the suggestion, the suit came to be filed. Till the property is given back to the plaintiff, he is entitled to mesne profits.

2. The defendant resisted the suit contending inter alia as follows:

The plaintiff has no right over the suit properties. The plaintiff's brother deceased Subbian Chettiar sold the entire suit properties in favour of the defendant. The sale was on behalf of the plaintiff also. He also accepted the same and did not question it in any Civil Court within the period of limitation. The defendant is in possession of the suit property, after redeeming the earlier mortgage and his possession is that of a jenmi. In any event, the suit is barred by limitation as well as by adverse possession.

3. There were other defences raised, but for the purpose of disposing of the second appeal, they are not relevant.

4. The trial Court framed the necessary issues and on the oral and the documentary evidence, held that the plaintiff was an agriculturist entitled to the benefits of Act 4 of 1938, that the mel-othi as pleaded by him, was true and that the defendant had not prescribed for title by adverse possession. In short, the learned District Munsif held on all issues in favour of the plaintiff and by judgment and decree dated 10-12-1986 granted the plaintiff's prayer.

5. The defendant filed appeal in A.S.No.5/87 before the Subordinate Judge's Court, Padmanabhapuram. The learned Subordinate Judge, by judgment and decree dated 29.8.1989 confirmed the decision of the trial Court and dismissed the appeal.

6. It is as against that, the present second appeal has been filed. At the time of admission, the following substantial question of law was raised for decision in the second appeal:

"Is not the possession of the defendant adverse to the plaintiff by reason of Exs.B-2 and B-3 sales and the title of the plaintiff lost by adverse possession?"

7. Mrs. Chitra Sampath, learned Counsel for the appellant, submitted that: the plaintiff came forward with a definite case that the defendant was an assignee of the suit mortgage dated 10-10-1122 M.E. and she failed to establish the same and therefore, the suit for redemption against her was not maintainable; the Courts below were in error in relying on Ex.A-4 written statement in an earlier suit O.S.No.622/81, in which, according to the plaintiff, the defendant had admitted about the assignment; in any event, the Courts below ought to have held that from the dates of sale under Exs.B-2 and B-3 in 1970, the defendant must be deemed to have been in possession of the properties and prescribed for title by adverse possession; even otherwise, from the date of the alleged assignment, viz. 25-6-1949, the period of 30 years prescribed under the Limitation Act for redemption expired in 197 9 and the suit having been filed only in 1983 was barred by limitation.

8. Per contra, Mr. Sreekumaran Nair, learned Counsel for the

respondent, submitted that the Courts below have concurrently found that there was an assignment in favour of the defendant, that the plaintiff was an agriculturist entitled to the benefits of Act 4 of 1938 as amended by Act 8 of 1973 and limitation if at all, would commence only from the date of coming into force of the Amendment Act 8 of 1973, on which date it must be deemed that the debt stood discharged.

9. In this connection, the learned Counsel relied on the judgment of S. NATARAJAN, J. in GNANAMMAL VS. ELAYAPERUMAL NADAR AND OTHERS (19 76(2) MLJ 269).

10. The learned Counsel for the appellant sought to distinguish the case relied on by the learned Counsel for the respondent, stating that the facts in that case were entirely different from the facts of the present case and therefore, the ratio of that decision would not apply.

11. From the above submissions the following additional substantial question of law arises for consideration:

"Whether the suit filed in 1983 more than 30 years from the date of mortgage in 1947 or assignment in 1949 is in time?"

12. As already noted, the Courts below found that the plaintiff was an agriculturist entitled to the benefits of Act 4 of 1938, as amended by Act 8 of 1973. Under the said Act, Section 9-A.(5)(a) provides that,

"where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of thirty years or more, then notwithstanding anything contained in Sections 8, 12 and 13, the mortgage debt swhall be deemed to have been wholly discharged with effect from the expiry of the period of thirty years or where such period expired before the publication of Tamil Nadu Agriculturists Relief (Amendment) Act, 1973 in the Tamil Nadu Government Gazette with effect from the publication of that Act -
(i) if no interest has been stipulated for on the principal amount secured by the mortgage or any portion thereof, in addition to the usufruct from the property;

(ii) where such interest has been stipulated for, if no arrears of interest are due from the mortgage; and

(iii) if no other sums or interest thereon are due to the mortgagee by the mortgagor in his capacity as such."

13. In paragraph 17 of the judgment of the lower Appellate court, the learned Judge had referred to the concession made on behalf of the appellant that the plaintiff was an agriculturist. If the plaintiff was an agriculturist, then by virtue of the provisions of the Act already referred to and in view of the possession of the property by the mortgagee for a period of 30 years and more, the entire debt must be deemed to have been discharged.

14. The only point surviving for consideration therefore is as to when the period of limitation would commence. According to the learned Counsel for the appellant, the period must be deemed to have expired in 1979 and the suit having been filed only in 1983, was clearly barred by limitation.

15. Incidentally, the point has been raised by the learned Counsel that the plaintiff had not proved the assignment. There was an earlier suit filed by the plaintiff's brother Subbian Chettiar's son Ayyappan and others against the present plaintiff and others. The present defendant was the third defendant in that suit. In the written statement in that suit, this is what he had stated:

"Half of suit item 1 was mortgaged by the first defendant (the present plaintiff) to a stranger and by change of hands, the third defendant got mortgage right and possession. The said mortgage became barred by limitation and the third defendant became the absolute owner. The father of plaintiffs 1 and 2 sold his entire right in suit item 1 to the third defendant for valid consideration and family necessity on 21-2-1970, and accordingly, the third defendant is in possession of the same. She is the owner of the entire suit item 1."

16. There can be no clearer admission of the assignment in favour of the present defendant. The defendant is therefore estopped from disputing that she became an assignee of the othi by the plaintiff on 1 0.10.1122 M.E. (24-5-1947). The assignment pleaded is dated 11.11.11 24 M.E. (25-6-1949). We have therefore to see whether the suit filed in 1983 was in time.

17. It is in this connection, the learned Counsel for the respondent relied on the judgment in GNANAMMAL VS. ELAYAPERUMAL NADAR AND OTHERS (1976(2) MLJ 269). Before going into the details of that case, let us refer to the provisions of the Transfer of Property Act, with particular reference to usufructuary mortgage. Section 62 of the Act provides as follows:
"Right of usufructuary mortgagor to recover possession:

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, -

(a) where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property – when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage money, - when the term (if any), prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in Court as hereinafter provided."

The relevant Article under the Limitation Act is Article 61(a). It provides a period of 30 years to the mortgagor to redeem or recover possession of immovable property mortgaged from the date, right to redeem or to recover possession accrues.

18. In the instant case, the right to redeem or to recover possession must be deemed to have accrued only from the date the mortgagee completed 30 years of possession. It is settled legal principle that in the case of a usufructuary mortgage where a mortgagee has a right to hold the land mortgaged until the mortgage debt is paid off by appropriation of profits, the right to redeem or to recovery of possession may not accrue until the debt is so satisfied. As pointed out by the Supreme Court in PRITHINATH VS. SURAJ AHIR (AIR 1963 SC 1041), on the payment of the mortgage money by the mortgagor to the mortgagee, the mortgage comes to an end and the right of the mortgagee to remain in possession ceases.

19. It is also equally well settled that when a mortgagee in possession under a usufructuary mortgage holds over after the expiry of the period, for which the mortgage is granted, his possession does not by that fact alone become adverse to the mortgagor, who still has the period prescribed by the article within which the suit for recovery of possession. The mere fact that the mortgagee held on after he ought to have given up possession would not alter the character of the suit as one between the mortgagor and mortgagee and as one falling within the terms of Article 61, clause (a). (BAKHTAWAR BEGUM VS. HUSSAINI KHAUM (26 MLJ 474 (PC) = ILR 36 Allahabad 195))

20. "A mortgagee cannot by a mere assertion of his own title or by unilateral act on his own part convert his possession of moiety of the property as a mortgagee into that of an absolute owner, which he can do so only if he had purchased the entire equity of redemption from the mortgagor. If there has been a sale of the entire property to the mortgagee, thus putting an end to the mortgage, even held to be invalid subsequently, the mortgagee's possession subsequent to the date of the said sale would become adverse, for by the conscious act of the parties, the mortgage would have been put an end to." (SANJIV ROW'S TRANSFER OF PROPERTY ACT, SIXTH EDITION – Page 1198).

21. In the present case, the possession of the defendant can be referable only to his rights as an assignee, the sales in his favour coming to light only when he filed his written statement in the earlier suit. Even according to the defendant, it was only the plaintiff's brother, who sold the property to him, though he would plead that it was on behalf of the plaintiff also. Perhaps, the learned Counsel for the appellant wanted to submit that from the dates of sale in 1970, the suit ought to have been filed within 12 years, viz. 1982 and the suit filed in 1983 was barred by limitation. I cannot agree. It is not possible to hold that the possession of the defendant of the suit properties was referable to the sale deeds in her favour and not the assignment.

22. In PERIYA AIYA AMBALAM VS. SHANMUGHA SUNDARAM (ILR XXVIII Madras 903 (FB)) relied on by Mr. Sreekumaran Nair, it has been held as follows:

"When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person, there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee or one who purchases the mortgage as a mortgage; or he may be an adverse claimant to the mortgage right; where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person. The defendant has therefore to show that he took possession of his property as absolute property in contradistinction to mortgage property. Nor is this sufficient; as his possession may be consistent with the mortgagor's title, the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed to him and the possession cannot be said to be adverse."

The appellant has miserably failed in her attempt to show that she was in possession as her absolute property and not as assignee.

23. Under the Transfer of Property Act read with the Limitation Act, right to redeem and the right of a suit for possession of a mortgaged property are extinguishable on the expiry of 30 years from the date of execution of the mortgage in cases of usufructuary mortgage where no fixed period is provided for redemption. However, where Debt Reliefs Act are made applicable, then they prevent this consequence and if the 30 year period gets over during the coming into force of the Debt Reliefs Act, that is to say, if during the period available for redemption, viz. 30 years in the case of a mortgage, if an agriculturist/debtor becomes entitled to the benefits of the Debt Reliefs Act, then from the date the right accrues, that is to say, when the entire debt is deemed to have been discharged, the right accrues from that day and limitation will begin to run from then on and not from any earlier point of time.

24. For the above proposition we have support from the decision in GNANAMMAL VS. ELAYAPERUMAL NADAR AND OTHERS (1976(2) MLJ 269) where the facts were as follows:

The plaintiff filed the suit for redemption of a usufructuary mortgage created on 29th March, 1899 and claimed the right to redeem it under Madras Act 4 of 1938, as amended by Act 24 of 1950. The suit was dismissed by the trial Court and the lower Appellate Court confirmed it on the ground of limitation.

On second appeal by the plaintiff, it was held as follows:

"By reason of the operation of the Madras Act 4 of 1938, the mortgage debt must be deemed to have been wiped out on the day of Amended Act came into force, for, by then the mortgagee or his successor in interest had been in possession of the property for more than the period of thirty years prescribed under the Act. Consequently, the appellant had a statutory right from that

date under the provisions of Section 62 of the Transfer of Property Act to seek recovery of possession. As the appellant had filed the suit within a period of thirty years form the date of debt got extinguished by virtue of the Act 4 of 1938 , the appellant must be held to have become entitled to recover possession of the suit property."

The learned Judge further observes that,

"the respondents could not be heard to say that from the date of the wiping out of the mortgage debt by the operation of law, their possession had become adverse to the appellant and therefore the suit filed beyond twelve years was barred by limitation; more so, when there was nothing to show that the respondents had set up hostile title in themselves over the suit property."

The learned Judge referred to two earlier decisions of the Allahabad High Court in RAM PRASAD VS. BISHAMBHAR SINGH (AIR 1946 Allahabad 400) and PARASRAM VS. BINDESHARI (AIR 1953 Allahabad 33). In the latter decision relied on by the learned Judge, this is what has been expressed by the Bench:

"In an application under Section 12, U.P. Agriculturists Relief Act, 1934, it is open to a usufructuary mortgagor to ask for recovery of possession of the mortgaged property without the payment of the mortgage money if the mortgage

money has been paid up from the usufruct of the property, and the period of limitation for such an application is sixty years from the date when the mortgage money was so satisfied and the right to recover possession accrued."

25. This decision of the learned single Judge of this Court was affirmed by a Bench in GNANAKAN NADAR VS. GNANAMMAL AND THREE OTHERS (1980 TLNJ 217). The learned single Judge has also referred to the earlier Privy Council and the Supreme Court decisions in KHIARAJMAL VS. DAIM (ILR 32 Calcutta 296) and LILACHAND VS. MALLAPPA (AIR 1960 SC 85 = 1960(1) SCR 693 = 1960 SCJ 96), where it has been held that,

"where the mortgagee comes into possession of the property pursuant to the usufructuary mortgage, his possession has a lawful origin and a mere assertion of an adverse title on his part cannot affect the subsisting equity of redemption of the mortgagors or operate to shorten the period of limitation prescribed for a suit for redemption."

Again, as pointed out in MULCHAND VS. GANGA (AIR 1951 Nagpur 366) also referred to by the learned single Judge, by the mere fact of satisfaction of the mortgage debt the possession of the usufructuary mortgagee would not become adverse to the mortgagor and as such, the mortgagee cannot be said to have excluded the mortgagor from possession from the date of satisfaction of the mortgage.

26. The learned Counsel persevered for the appellant in her submission that the mortgage was created in 1947, assigned in 1949 and limitation would commence from 1949 if not from 1947 and the suit not having been filed by 1979, was bar5red by limitation. According to the Counsel,

right to sue accrued in 1949. For the reasons already stated, this argument cannot pass muster.

27. The learned Counsel made an attempt to interpret the Bench decision in GNANAKKAN NADAR's case as holding that the passing of the Debt Relief Act was alone the material date and not the actual wiping off under one or other of the provisions of the Act. In that case, the usufructuary mortgage was created in 1899. Section 9-A with regard to usufructuary mortgages was introduced by an amendment in 1950 to Act IV of 1938. By operation of Section 9-A, it was held that the debt stood wiped out though 30 years of possession by the mortgagee was over even by 1929. It should also be noted that 60 year period for redemption under Article 148 (Old Act)/Article 61(a) (New Act) had not elapsed by 1950 when the amendment was incorporated providing that if the mortgagee had been in possession for 30 years the debt stood discharged. The cause of action accrued in 1950 in that case. The suit was filed in 1968 within 30 years under the new Limitation Act and 60 years under the old Limitation Act, though it could have been filed even by 1980.

28. In the present case, the usufructuary mortgage was created in 1 947, assigned in 1949, stood wiped out in 1979 and cause of action accrued only then and the mortgagor would have clear 30 years from 1979 under Article 61(a) of the Limitation Act. It is to be further noted that Act IV of 1938 was extended to Kanyakumari District only on 18 -1-1973 and there is therefore no difficulty even otherwise in holding that the mortgage stood discharged after the introduction of the Act in 1973 and the suit filed in 1983 was in time.

29. In BALAMMAL NADACHI AND FOUR OTHERS VS. SELVANAYAGAM @ KUMARACHANDRAPERUMAL & ANOTHER (2002(2) CTC 717 decided by GOVINDARAJAN, J. the mortgage was executed on 29-10-1912, the suit was filed in 1981 relying on two assignment deeds dated 26-4-1943 and 1-7-1946 where the defendants had acknowledged the mortgage of 1912. The learned Judge held that thirty year period had to be counted from 1-7-1946 and before expiry of 30 years Act IV of 1938 was extended to Kanyakumari District with effect from 18-1-1973 and therefore another 30 year period had to be added and the suit filed in 1981 for redemption of suit property was held to be not barred by limitation.

30. For all the reasons stated above, the submissions made on behalf of the appellant cannot be accepted. Consequently, the substantial question of law and the additional substantial question of law are answered against the appellant. The second appeal fails and the same is dismissed. However, there will be no order as to costs.

13-9-2002
Index: Yes
Internet: Yes

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To

1. The Subordinate Judge,
Padmanabhapuram (With records).

2. The Principal District Munsif,
Padmanabhapuram.

3. The Record Keeper,
V.R. Section,
High Court, Madras.

Judgment
in
S.A.No.1940 of 1989